

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of Petition  
of  
TISHMAN REALTY & CONSTRUCTION CO., INC.  
for redetermination of deficiency of  
franchise tax under Article 9-A of the  
tax law for the fiscal year ended  
September 30, 1967  
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Tishman Realty & Construction Co., Inc. having filed petition for redetermination of deficiency of franchise tax under Article 9-A of the tax law for the fiscal year ended September 30, 1967, and a hearing having been held on October 26, 1971 before John J. Genevich, Hearing Officer of the Department of Taxation and Finance, at the office of the State Tax Commission, 80 Centre Street, New York City, at which hearing the taxpayer was represented by Irving M. Peretz, treasurer, Robert T. Jaeckel, assistant controller, Howard Weinstein, Esquire, general counsel, and Benjamin Grund, C.P.A., and Jerome A. Seidman, C.P.A., of the accounting firm of Seidman & Seidman, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

- (1) Tishman Realty & Construction Co., Inc. was incorporated under the laws of New York State on December 24, 1927.
- (2) It constructs and operates real property and is a holding company performing management services for subsidiaries.
- (3) In the franchise tax report filed for the fiscal year ended September 30, 1967, mortgage notes issued by Horizon House Associates, a partnership, and 665 Skinker Boulevard Associates, a partnership, were included in investment capital. Interest income of \$2,175,000 from Horizon House Associates and \$246,858.61 from 665 Skinker Boulevard Associates, on the mortgage

notes, was included in investment income.

(4) Based on a field audit examination, notice of deficiency was issued on September 15, 1970 for the fiscal year ended September 30, 1967, as follows:

Entire net income	\$3,240,930.52
Adjusted investment income	45,835.80
Business income	3,195,094.72
Adjusted investment allocation	57.4215%
Business allocation	42.04232%
Allocated investment income	26,319.60
Allocated business income	1,343,291.31
Allocated entire net income	1,369,610.91
Tax at 5½%	75,328.60
Subsidiary capital tax	3,494.95
Total	78,823.55
Tax previously assessed	40,024.10
Deficiency	\$ 38,799.45

Investment capital was adjusted by excluding the mortgage notes issued by Horizon House Associates and 665 Skinker Boulevard Associates. This adjustment resulted in a revised investment allocation of 57.4215%. Investment income was adjusted to \$45,835.80 by excluding interest received on these mortgage notes. Such interest was treated as business income.

(5) Petition for redetermination of deficiency was timely filed.

(6) On September 28, 1967, real estate owned by Horizon House I Inc., Horizon House II Inc., Horizon House III Inc., Horizon House IV Inc., Horizon House Center Towers Inc., and Horizon House Management Corp., subsidiaries of Tishman Realty & Construction Co., Inc., was sold to Horizon House Associates for \$750,000 cash and a mortgage note of \$7,250,000 payable in fifteen years with interest at the rate of 6% per annum. The contract of sale called for the prepayment of \$2,175,000 interest for the first five years. The purchaser

was required to make additional quarterly payments out of "surplus cash flow" which were to be applied first against interest for the remaining ten years of the mortgage and then to principal. If any payments of principal are made, interest from the date of payment to the due date of the mortgage at the rate of 6% per annum must be credited to the purchaser.

(7) On September 28, 1967, real estate owned by Tracco Skinker Corp., a subsidiary of Tishman Realty & Construction Co., Inc. was sold to 665 Skinker Boulevard Associates for \$250,000 cash and a mortgage note of \$4,750,000 payable in ten years with interest at the rate of 6½% per annum. The contract called for a prepayment of \$246,858.61 interest for the first ten months.

(8) Simultaneously with the sales, the subsidiaries were merged into the taxpayer pursuant to election made under Section 332 of the Internal Revenue Code. In accordance with such election, Tishman Realty & Construction Co., Inc., as holder of the mortgage notes of Horizon House Associates and 665 Skinker Boulevard Associates, included in its federal taxable income, and consequently in its New York State entire net income, the interest received of \$2,175,000 and \$246,858.61, respectively. Interest required to be credited to Horizon House Associates in subsequent years because of any prepayment of principal would be an allowable deduction to Tishman Realty & Construction Co., Inc.

(9) Section 208.9 of Article 9-A of the tax law provides, in part:

"The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, \* \* \*, except as hereinafter provided, and subject to any modification required \* \* \*."

None of the modifications in the above section provides for the exclusion of prepaid interest income.

(10) Section 208.5 of Article 9-A of the tax law defines investment capital as,

"investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, \* \* \*;"

(11) Section 208.6 of Article 9-A of the tax law defines investment income as,

"income, including capital gains in excess of capital losses, from investment capital, to the extent included in computing entire net income, \* \* \*;"

(12) Section 208.8 of Article 9-A of the tax law defines business income as,

"Entire net income minus investment income;"

The State Tax Commission hereby

DECIDES:

(A) Partnership obligations are not investment capital in accordance with (10) above, inasmuch as a prime requisite is that the stocks, bonds and other securities must be either corporate or governmental obligations. Furthermore, purchase money obligations do not qualify as investment capital pursuant to Section 3.31 c of Ruling of the State Tax Commission promulgated March 14, 1962.

(B) Interest received by Tishman Realty & Construction Co., Inc. on these obligations is includable in entire net income to the same extent that it is includable in federal taxable income, and such interest is business income.


(C) The notice of deficiency issued on September 15, 1970 is affirmed as correct, together with interest in accordance with Section 1084 of Article 27 of the tax law.

Dated: Albany, New York

this 28th day of March 1972.

STATE TAX COMMISSION

  
President

  
Commissioner

  
Commissioner